



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
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6 pgs
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SPECIAL

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer -

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SUBJECT: Office of Government Ethics draft report to the conferees on section 1008 of H.R. 1487, "Foreign Relations Authorization Act" regarding the President's Foreign Intelligence Advisory Board.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than WEDNESDAY, AUGUST 30, 1989.

Questions should be referred to SUE TEAU/ANNETTE ROONEY (395-7300), the legislative analyst in this office.

STAT

Ronald K. Peterson
RONALD K. PETERSON FOR
Assistant Director for
Legislative Reference

Enclosure

cc: J. IRWIN
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H. SCHREIBER
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SPECIAL



United States
Office of Government Ethics
P.O. Box 14108
Washington, D.C. 20044

August 24, 1989

MEMORANDUM

TO: Ronald K. Peterson
for Assistant Director for
Legislative Reference

FROM: ~~F. Gary Davis~~
General Counsel

SUBJ: Proposed letter to the Conference Committee on Section
1008 of H.R. 1487, a requirement that the members of
PRIAB file financial disclosure reports every 6 months
with the Office of Government Ethics

Attached for review and clearance is a copy of a letter that this Office proposes be sent to the conference committee on H.R. 1487. This letter is almost the same letter that was cleared and sent by this Office to Senator Pell on July 13, 1989. Because that letter was sent very late and may not have been received by the Senator in time for the full Foreign Relations Committee or the Senate to consider our comments carefully, we believe that it is appropriate that all members of the conference committee have the benefit of our concerns on this issue.

Attachment

[This letter would be addressed to the appropriate members of the conference committee once they have been selected.]

Dear _____

I understand that H.R. 1487, the Foreign Relations Authorization Act FYs 1990 and 1991, has passed both the House and the Senate and that there will be a conference in September. While it would be unusual for this Office to comment on an authorization act other than our own, there is a provision in section 1008 of that bill that is of substantial concern to this Office. That section requires members of the President's Foreign Intelligence Advisory Board (PFIAB) file a report with the Office of Government Ethics every 6 months purported containing financial information.¹ I would like to share with you my concerns about such a requirement, some of which I provided earlier to Senator Pell with regard to a similar provision in S. 1169.

First, financial disclosure is a tool in assisting the government, and in some instances the public, in determining if a potential for conflict of interest exists between the actions of a public servant and the financial interests that he or she holds. As with all ethics statutes and ethics-related statutes, it should be directed at fulfilling a legitimate government purpose without affecting the individual or individuals more than necessary. As we have all seen there seems to be a feeling that, whenever there is a concern with the actions of government officials, more legislation or regulations are demanded, oftentimes containing restrictions that will hamper other legitimate government objectives without affecting the individual or individuals whose actions were the cause of concern. In order to have a good and effective ethics program for federal officials, I believe that it is important to guard against unnecessary and ultimately hampering restrictions as well as to enforce vigorously those statutes that impose restrictions for legitimate government purposes.

In 1978, Congress determined that individuals holding certain high level positions in the government should be subject to public financial disclosure rather than simply confidential disclosure to

¹Given the actual language of the section, however, the report would contain no information and would not have to be retained, reviewed or released by the Office of Government Ethics.

the employing agency. Prior to that time, agencies had been requiring confidential financial disclosures from employees in those positions where there was a real potential for conflict of interest so that the disclosure could be used as a counseling tool in order to assist the officers and employees in avoiding inadvertent conflicts of interest. After passage of the Ethics in Government Act, individuals in certain high level positions (almost always full time) were required to file public reports rather than confidential ones. Those who had been covered by the confidential system, but who were not covered by the public system, were still requested to file confidentially for agency review.

Under the present system, and consistent with the purpose of financial disclosure, a special Government employee member of an advisory committee is expected to file a financial disclosure report with the agency which the committee serves. This report is to be used to advise the member regarding potential conflicts of interests between his or her financial interests and relationships and the actions the individual might be required to take as an advisory committee member. When a review of a confidential disclosure reveals information that indicates a potential conflict of interest, the member is required either to recuse him- or herself from matters affecting that conflicting interest or to obtain a waiver. When a waiver is obtained, the practical consequence is public disclosure of the financial interest that gives rise to the conflict. If and when a special Government employee member of a high level advisory body actually serves more than 60 days in any calendar year, then he or she must file a public report. In either case, the conflict of interest statutes apply to the member from the very first day of service.

Section 1008 appears to be intended to do three things that are not consistent with the present scheme or purpose of financial disclosure laws. First, it requires members of an advisory body to file a financial disclosure with someone other than the agency which might reasonably be expected to know what matters would come before the body and thus to counsel the individuals with regard to the potential conflicts disclosed on their filed reports. Under present law, the only financial disclosures that are filed directly with this Office are those of the President, Vice President and the Director of this Office. All others are filed with the employing agency and reviewed there. Only copies of those reports of individuals who hold advice and consent positions and a few high level individuals within the EOP are required to be transmitted here for a second review. In the case of the members of PFIAD, this Office would not in any way be in a position to review these reports properly.

Second, the section seems to require a report more often than is required of any other individual within the government. If the reports are to be used in the manner which has justified the filing of financial disclosure reports in the past, i.e. as a counseling tool and a reasonable manner in which to assure the

public that the highest officials in their government are acting appropriately with regard to their personal financial interests, rather than a document to appease voyeurs, then there seems to be no overriding circumstances that require the members of this advisory committee to be treated more stringently than others in the government who act in such matters on a daily basis. The requirement for all other filing public reports is to file at the time of entry, annually thereafter, and then at termination.

Third, the present systems of financial disclosure are designed to cover all special government employee members of federal advisory bodies in the same manner. The system takes into consideration that these individuals serve the government for important but limited purposes, generally without compensation. Because those requested to serve typically have already demanding schedules, the time the government requires of them to complete these forms has been weighed carefully so as not to discourage the individuals from agreeing to serve. To single out the members of PFIAB for separate and differing treatment raises concerns not only for the administrative difficulties but the legitimacy of the requirements.

Finally, with regard to the language of the requirement for a report itself, please note that the Ethics in Government Act provides authority for both confidential and public financial disclosures and that authority is found in two separate sections within Appendix 4 of Title 5, United States Code. Further, the statute has very specific language when referring to the public's access to certain reports filed under its terms and this Office follows them very carefully when determining whether to release a report to the public. Not all reports filed in this Office are automatically available to the public.

As a comment on the conflicts of interest restrictions, special Government employee members of all federal advisory bodies including PFIAB, may not, unless they receive a specific exemption from the head of the agency to which the advisory body is attached, be agents of foreign governments, nor can they receive compensation from any source specifically for acts taken as a special Government employee. In addition, they may not take an action in any government matter that will have a direct and predictable effect on their financial interests or those of employers. They also may not disclose any confidential or classified information gained while acting as a special government employee. All of these restrictions are directed at protecting governmental processes and information and all contain criminal penalties. I believe that the provision in section 1008, regarding a Congressional finding that it is inappropriate for the members of PFIAB to receive any income from a foreign government or government-controlled entity for services that are unrelated to the United States Government, focuses only on compensation rather than protecting governmental processes. Compensation, standing alone, is not evil.

I appreciate your consideration of my comments. The Office of Management and Budget advises that there is no objection, from the standpoint of the Administration's program, to the submission of this letter.

Sincerely,

Frank Q. Nebeker
Director